



Comptroller General
of the United States

Washington, D.C. 20548

Arsenoff
147172

Decision

Matter of: Camar Corporation

File: B-248485

Date: August 31, 1992

James A. Mercanti for the protester,
Wayne M. Allen for Ramfan Corporation, an interested party.
Charles J. McManus, Esq., Jonathan H. Kosarin, Esq. and Gary
Van Osten, Esq., Department of the Navy, for the agency.
Robert C. Arsenoff, Esq. and Andrew T. Pogany, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Where solicitation for water-driven blowers clearly required bidders to submit certified test data indicating that products had been tested under specified conditions and protester's test data indicated that these conditions had not been met, agency had a reasonable basis for rejecting protester's bid as nonresponsive.

DECISION

Camar Corporation protests the rejection of its bid under invitation for bids (IFB) No. N00104-92-B-0006, issued by the Department of the Navy for water-driven blowers which are used on shipboard to exhaust dangerous gases.

We deny the protest in part and dismiss it in part.

The solicitation contained a section entitled "Pre-Qualification Test." Paragraph 3.1 of that section required that the "water driven blower[s] furnished under this specification shall be products which were qualified [prior] to the closing of bids." That provision also stated that a test report certified by an independent test facility "must be received in conjunction with the proposal [in order for the bid] to be considered responsive." This language is essentially repeated in paragraph 3.5 of the test section, which also states that the prescribed tests are intended to ensure "that the equipment being delivered . . . is in accordance with solicitation requirements." Paragraph 3.3 of the test section detailed the product tests to be performed and the specific conditions under which the tests were to be conducted.

Camar submitted the apparent low bid which was accompanied by a prequalification test report from Alderson Research Laboratory (ARL) concluding that the protester's water-driven blower had, among other things, passed orientation, stability, noise, drop, endurance and discharge water back-pressure tests as required by paragraph 3.3 of test section of the IFB; however, the ARL test report clearly indicated, and the protester does not dispute, that none of these tests was conducted with an inlet water pressure of 180 pounds per square inch (psi) as required by subparagraph 3.3.1 of the test section.

Camar's bid, one of two received, was rejected because the firm's proposed water-driven blowers had not been tested in accordance with the conditions set forth in the specification; the notice of rejection was accompanied by findings based on an evaluation conducted by the agency engineer who observed a portion of the testing at ARL. Award was then made to the other bidder, and Camar protested, arguing that the data should have been considered acceptable.

As a preliminary matter, we note that requirements for certified test data to be submitted in a sealed bid procurement generally relate to verifying a bidder's ability to provide the required items and as such most often involve matters of responsibility rather than responsiveness; on the other hand, if the data is needed to determine whether the offered items themselves conform to the solicitation's specifications, a bidder's failure to include appropriate data requires rejection of the bid as nonresponsive, Western Waterproofing Co., Inc., B-183155, May 20, 1975, 75-1 CPD ¶ 306, provided that the solicitation clearly states the

¹The IFB provides that the water-driven blowers will be required to operate in use at an inlet water pressure of up to 180 psi. In addition to ARL's failure to test at this pressure as required by the solicitation, the Navy notes a number of other deficiencies with the firm's prequalification report: a failure to certify that substitute ocean water in accordance with commercial standard ASTM D1141 was used during the tests; a failure to conduct the endurance test with three 24-hour interruptions; a failure to demonstrate that the fire hose used in testing was in accordance with Military Standard MIL-H-24606; a failure to demonstrate that the static pressure obtained in the aerodynamic test was equivalent to 60 feet of 10-inch diameter hose; and a failure after testing to inspect the water-driven blower for cavitation, erosion or corrosion damage. The protester has offered no substantive rebuttal to these conclusions.

purpose for which the data is required, the extent to which it will be considered in the evaluation of bids and the rules that will apply if a bidder fails to furnish the data. Commercial Window & Door Co., Inc., B-211280, Nov. 18, 1983, 83-2 CPD ¶ 582; Cecile Indus., Inc., B-194273, Apr. 23, 1979, 79-1 CPD ¶ 282.

In the most recent case dealing with this issue, we found that the test data requirement involved a matter of responsibility because the solicitation stated only that test reports had to be submitted "along with bids" without specifying how the data would be used during the evaluation, and because some of required test data actually related to the installation of the items being purchased and, thus, could not be submitted with the bids. Acoustic Sys., B-248373; B-248374, Aug. 24, 1992, 92-2 CPD ¶ _____. Here, in contrast, the solicitation stated that acceptable certified test data must accompany a bid in order for that bid to be responsive. Further, the solicitation specifically stated that the data was required to ensure that "the equipment being delivered . . . is in accordance with solicitation requirements." Although the IFB did not also state that the failure to furnish acceptable data would result in bid rejection, we think that the specification language was sufficient to alert bidders to the agency's intention to impose a bid responsiveness requirement and that bidders so understood the requirement. See Western Waterproofing Co., Inc., supra. Our conclusion in this respect is supported by both bidders' submission of the data with their bids and the fact that the protester does not argue that the test data requirement involved a matter of responsibility. We therefore think that the agency properly regarded the adequacy of Camar's test data as a matter of bid responsiveness.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the material terms and conditions of the solicitation; if a bidder provides information that reduces, limits or modifies a material solicitation requirement, it must be rejected as nonresponsive. Cuernilargo Elec. Supply, B-240249, Nov. 2, 1990, 91-1 CPD ¶ 68. The determination of whether a bidder's product meets an IFB's technical specifications is a matter primarily committed to the discretion of the contracting agency which must bear the burden of any difficulties resulting from a defective determination; thus, we will not disturb an agency's determination as to whether a bid is responsive to technical specifications unless the record shows that the decision lacked a reasonable basis. See Alaska Indus. Resources, Inc., B-236043, Oct. 26, 1989, 89-2 CPD ¶ 382.

The record demonstrates, and the protester does not argue otherwise, that the test conditions specified in the IFB were material terms of the solicitation. Notwithstanding Camar's unsupported suggestion that the IFB's provisions relating to minimum inlet pressure during testing are ambiguous and somehow subject to varying interpretation, they are clearly not; subparagraph 3.3.1, entitled "Tests," unequivocally states that "the following conditions shall apply . . . the water pressure shall be 180 psi at the inlet to the water-driven blower." Since the results of the testing conducted by ARL on the protester's water-driven blowers reveal that they were not subjected to inlet pressures approaching 180 psi, the agency had a reasonable basis for concluding that the protester's bid was not compliant with the specifications and therefore, nonresponsive. Cuernilargo Elec. Supply, supra; Alaska Indus. Resources, Inc., supra.

Nonetheless, Camar contends that the Navy bears responsibility for its failure to submit an acceptable test report because the agency "preapproved" ARL as a testing laboratory. Camar further contends that, on February 3, the contracting officer agreed in writing to accept a report from ARL as "responsive" to the IFB. Finally, Camar contends that the agency engineer who witnessed a portion of the testing at ARL evaluated the laboratory's test setup and voiced no objection to it and, in fact, indicated that the tests were being performed properly.²

We find Camar's suggestion that, in initially approving ARL as a testing laboratory, the contracting officer somehow "waived" the mandatory requirements for test conditions to be without merit. The solicitation required preapproval of independent laboratories by the government and this was accomplished on January 3 when the contracting officer wrote Camar in response to an earlier inquiry about ARL and indicated that the laboratory was "acceptable for testing."

²On June 16, in its comments on the agency report in this matter, Camar for the first time alleged that the contracting officer and the agency engineer colluded to prevent the firm from receiving fair consideration during the procurement. While this allegation is not well-developed, by the protester's own representations, it is based upon a January 6 letter to Camar from the engineer in question and, as such, should have been filed with this Office within 10 working days of Camar's receipt of the letter. Since it was not raised until June 16, the allegation is untimely and, therefore, dismissed. Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1992); Aerospace Design, Inc., B-247938, July 21, 1992, 92-2 CPD ¶ 33.

On its face, this approval does not purport in any way to guarantee the acceptability of results of specific tests which were to be conducted in the future by ARL.

Likewise, we find no merit in the protester's suggestion that the contracting officer, by a letter dated February 3, prospectively agreed to accept as "responsive" any test results to later be supplied by ARL. The February 3 letter, in which the contracting officer confirmed certain conditions contained in Camar's January 30 letter to this Office as an offer to settle an earlier protest, B-247176, merely agreed to the following statement:

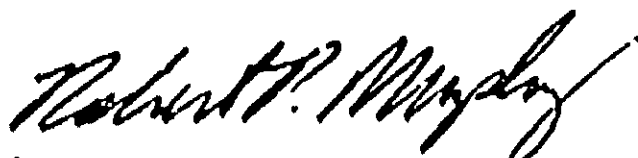
"The Test Report and Affidavit by the already-approved independent test laboratory [ARL] certifying successful completion of all tests per the requirements of subject Solicitation [shall] be considered responsive to Line Item 0001AD."

"Line Item 0001AD," to which the protester's January 30 letter referred, simply indicated that the submission of a test report was required and provided bidders with an opportunity to submit a price for the testing. Paragraph 3.3 of the IFB contained a separate, detailed, substantive requirement that the results in the test report certify successful completion of a number of operationally-oriented tests which were to be conducted under specified conditions which the water-driven blowers would encounter in shipboard use. Given this context, the Navy's accession to Camar's January 30 letter at best constitutes a reaffirmation of its earlier approval of ARL as an acceptable laboratory to submit a test report and cannot, in our view, be reasonably read, as the protester would have it, to effectively waive the mandatory requirements for minimum testing conditions so that any specific results later to be obtained from ARL would necessarily be considered responsive to the substantive requirements of paragraph 3.3--whether those results, or the manner in which they were obtained, conformed to the material IFB requirements or not.

Finally, we find no merit in the protester's suggestion that the participation of the Navy's engineer as a witness to a portion of the ARL testing of its products operated in some manner to "waive" the IFB requirements that the tests be conducted under specified minimum conditions. Viewed in a light most favorable to Camar, the record concerning the engineer's participation at the testing is inconclusive. According to the protester's unsupported allegations, the agency engineer evaluated ARL's testing setup and, on at least two undefined occasions, verbally approved the manner in which the tests were being conducted; according to the Navy, no such evaluation or verbal approval ever occurred.

Even assuming that the Navy's engineering representative had witnessed all of the tests conducted by ARL on behalf of Camar and had verbally approved ARL's procedures as alleged, Camar was not entitled to rely on such purported oral advice from a government technical representative in the face of explicit solicitation requirements relating to minimum requirements for performing the required tests which ARL failed to meet. Where, as here, an IFB includes the clause specified in Federal Acquisition Regulation § 52.214-6 requiring bidders to request an explanation or interpretation of the solicitation in writing and cautions that oral explanations given before award will not bind the government, a bidder relies on oral explanations--especially those which are inconsistent with the solicitation's express provisions--at its own risk. Cuernilargo Elec. Supply, supra. Thus, if Camar believed that the test conditions set forth in the IFB had been orally waived in any fashion as the result of the agency engineer's participation in the testing process, it was incumbent on the protester to have this confirmed in writing; the protester did not.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel